UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RICHARD F. MASSARO,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:02cv537 (PCD)
	:	
ALLINGTOWN FIRE DISTRICT, *et al.*,	:	
Defendants.	:	

RULING ON DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss plaintiff's amended complaint.[1] For the reasons set forth herein, defendants' motion to dismiss is **denied**.

I. BACKGROUND

Plaintiff alleges the following in his complaint. Defendant Allingtown Fire District ("District") is a fire department within the city of West Haven. The governing board of the district, defendant Allingtown Board of Fire Commissioners ("Board"), consisted of individual defendants Louis Esposito, John Samperi and Aaron Haley.

In January 1991, plaintiff was appointed fire chief of the District. On June 15, 1999, plaintiff and the District contracted for his continued employment as fire chief. Plaintiff was surreptitiously recorded making racial slurs to a retired firefighter, which recording was released to the New Haven

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[1] The present case was removed from the Connecticut Superior Court, judicial district of Ansonia-Milford. Defendants moved to dismiss the complaint prior to removal. Plaintiff filed an amended complaint subsequent to the filing of the motion to dismiss. The motion is therefore construed as a motion to dismiss the original complaint. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("an amended complaint ordinarily supersedes the original, and renders it of no legal effect").

Register and became the subject of a newspaper article. Defendants thereafter charged plaintiff with insubordination, dereliction of duty, conduct unbecoming a fire chief, violation of the public trust and immoral behavior for making racial slurs, which allegation plaintiff denied as untrue. On December 1, 2000, plaintiff retired from Allingtown under a retirement agreement which followed the allegedly false accusations.

Plaintiff here alleges that the retirement agreement is void (Count One), that his employment contract was breached (Count Two), that an implied covenant of good faith and fair dealing was breached (Count Three), a violation of 42 U.S.C. § 1981 (Count Four), a violation of 42 U.S.C. § 1983 (Count Five), a violation of 42 U.S.C. § 1985 (Count Six), a violation of CONN. GEN. STAT. §§ 53a-187, 53a-189 (Count Seven),[2] a violation of 18 U.S.C. § 2511 (Count Eight), civil conspiracy (Count Nine), fraudulent misrepresentation (Count Ten), slander per se (Counts Eleven, Twelve and Sixteen[3]), invasion of privacy (Count Thirteen and Seventeen), willful and wanton conduct (Count Fourteen), negligent infliction of emotional distress (Count Fifteen) and intentional infliction of emotional distress (Count Sixteen). Defendants move to dismiss the entire complaint.

II. DISCUSSION

Defendants argue that the complaint should be dismissed because (1) the individual defendants were acting in their official capacity; (2) there is no entity known as the Allingtown Fire District; (3) separation of powers principles preclude judicial interference with the legislative authority conferred on

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[2] It is not apparent how these state criminal statutes afford plaintiff a private right of action. Enforcement of such violations are typically matters of governmental, not private, concern.

[3] Plaintiff's amended complaint has two separate counts number sixteen. There are actually eighteen counts in total.

the Board through CONN. GEN. STAT. §§ 29-299, 29-300, (4) this Court lacks jurisdiction to direct legislative decisionmaking, (5) plaintiff failed to exhaust administrative remedies, (6) various other jurisdictional deficiencies, (7) failure to state claims for breach of contract, slander and negligent infliction of emotional distress, and (8) insufficient service of process as to the state court complaint.

A. Motion to Dismiss Standard

A motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All facts in the complaint are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

B. Actions in Official Capacity

Defendants argue that all claims against individual defendants Louis Esposito, Aaron Haley and John Samperi should be dismissed as the alleged offenses involve actions undertaken in their official capacity. Defendants have provided no basis on which to conclude that defendants involved herein are in fact agents of the State. It appears more likely that they are municipal officials, in which case they would not likely be considered an arm of the State. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) ("bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not

extend to counties and similar municipal corporations").

Defendants have otherwise provided no basis for concluding that the individual defendants are protected by "legislative and political immunity and sovereign immunity." It is their burden to provide sufficient information to establish the existence of such immunity. *See Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); *Harhay v. Blanchette*, 160 F. Supp. 2d 306, 312 (D .Conn. 2001). As defendants fail to provide sufficient information on which to conclude that there is an applicable immunity, the complaint will not be dismissed on the basis of such alleged immunity.

C. Nonexistent Entity

Defendants argue that the defendant entity identified as "Allingtown Fire District" does not exist, thus the complaint should be dismissed as to that nonexistent entity. How defendants may propound such an argument after counsel has entered an appearance on behalf of Allingtown Fire District is a mystery. If such an entity does not exist, then counsel would not be in a position to appear on said party's behalf.

Notwithstanding this apparent contradiction, plaintiff cites to a Special Act of the Connecticut Legislature dated January 1935 that refers to the Allingtown Fire District. *See* Connecticut Special Act 124 (Jan. 1935). Defendants fail to reply to this allegation, providing no evidence that subsequent acts have rendered the District obsolete.[4] The claims against Allingtown Fire District will not be dismissed

[4] This Court notes defendants' apparently inconsistent arguments in which they argue first that "[t]here is no such entity ["as the Allingtown Fire District"] as this is a description of an area of West Haven," and later "Allingtown Fire District was established prior to 1957, and has operated independently and as a self-governing district." Defendants may not have it both ways.

on this basis.

D. Separation of Powers

Defendants argue that there is no subject matter jurisdiction because the Allentown Board of Fire Commissioners is empowered to supervise and monitor the operation of the fire district, thus matters pertaining to the discipline of personnel employed thereby is legislative in nature thus not subject to judicial review. As stated above, the details of defendants ability to legislate are not clear. The references to CONN. GEN. STAT. §§ 29-299, 29-300 are unavailing as proceedings involving the dismissal of a "local fire marshal" bears no apparent relation to the governance of a fire district. Nor is citation of the powers of municipalities pursuant to CONN. GEN. STAT. §§ 7-148, 7-324 support for the proposition that the claims are unreviewable.

Even if it were possible to credit these bases as establishing legislative authority as a municipality, which defendants have in no way established, as a general proposition decisions limited to one individual are characterized as administrative rather than legislative. "If the action involves establishment of a general policy , it is legislative; if the action single[s] out specifiable individuals and affect[s] them differently from others, it is administrative." *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992) (internal quotation marks omitted). There is thus no basis on which to concludes that defendants are entitled to claim a particular immunity.

E. Exhaustion of Administrative Remedies

Defendants argue that plaintiff failed to exhaust his administrative remedies. Such an argument by its very nature presumes the existence of administrative procedures established by regulation or statute. *See Murphy v. Arlington Cent. Sch. Dist. Bd.. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002).

A failure to refer the issues involved herein to a legislative oversight committee does not constitute a failure to exhaust administrative remedies unless defendants can provide authority directing plaintiff to so refer his claims prior to filing his complaint. As defendants provide no authority for this proposition, it cannot be said that plaintiff failed to exhaust administrative remedies.

F. Other Theories Allegedly Implicating Lack of Jurisdiction

Defendants argue that this Court lacks jurisdiction for a number of reasons, including plaintiff's retirement prior to termination, res ipsa loquitor, unclean hands and a failure to state a claim on which relief can be granted.[5] The fact that plaintiff retired in lieu of being fired, while of potential significance legally and/or factually, does not however deprive this Court of jurisdiction. *See, e.g., Castellano v. City of N.Y.*, 142 F.3d 58, 71 (2d Cir. 1998). None of the remaining arguments validly challenge the jurisdiction of this Court and thus need not be discussed further.

G. Failure of Plaintiff to State a Claim for Breach of Contract, Slander and Negligent Infliction of Emotional Distress

Defendants argue conclusorily that counts alleging breach of contract, slander and negligent infliction of emotional distress should be dismissed for failure to state a claim. Defendants specifically argue that "no breach of contract can occur when the plaintiff retired," "[n]o negligent infliction of emotional distress can occur from not having a hearing," and "no facts are alleged that give any credence or rise to a level of slander." The burden is on defendants to articulate their argument in support of their motion to dismiss. *See Lillios v. Justices of N.H. Dist. Court*, 735 F. Supp. 43, 47

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[5] Defendants' arguments include a substantive tort theory, an equitable defense, and a basis for moving to dismiss a count pursuant to FED. R. CIV. P. 12(b)(6), none of which implicates the jurisdiction of this Court to hear the claims.

(D.N.H. 1990). The failure to include legal authority in support of their arguments constitutes inadequate support for their position and is grounds for denying the motion. Further the arguments assume the full lawful termination of the employment contract, which constitutes a question of fact.

H. Insufficiency of Process

Defendants argue that the complaint should be dismissed for failure to list a proper return date in the complaint filed with the state court. The complaint filed in the state court and included in defendants' notice of removal includes a return date. It is therefore not apparent that there is any defect whatsoever, thus there is no need to address the jurisdictional implications of such an omission.

III. CONCLUSION

Defendants' motion to stay (Doc. 4) is **denied as moot**. Defendants' motion to dismiss (Doc. No. 4) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, November ___, 2002..

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Peter C. Dorsey
United States District Judge